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MONTANA PROSECUTOR

JANUARY/FEBRUARY, 1979 VOL. 2, NO. 9

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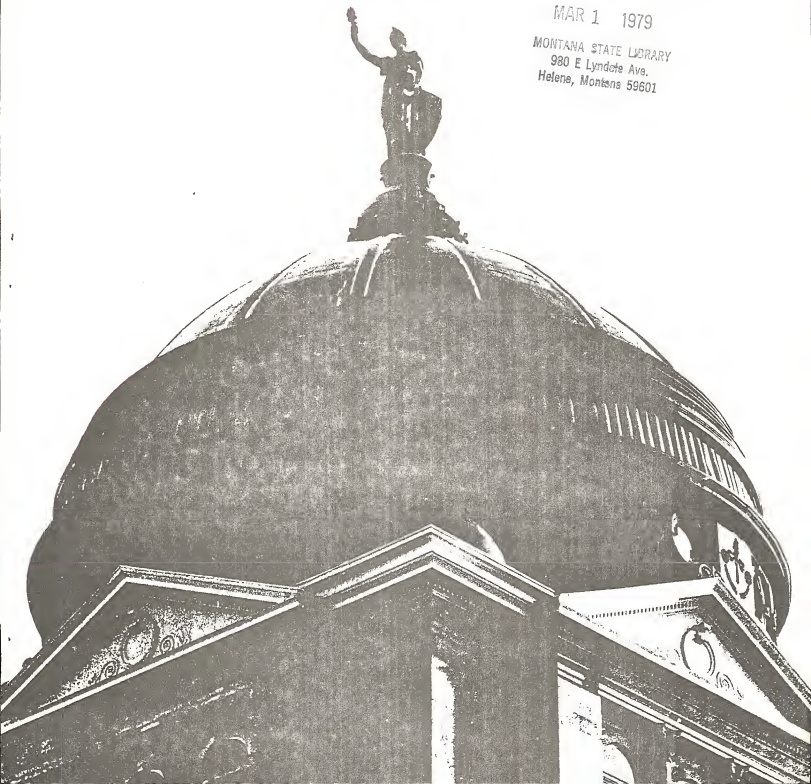


INTRODUCTORY NOTES

The Montana County Attorneys Association's annual conference will again be held at Fairmont Hot Springs. According to Ron Smith of the convention committee the dates of the convention will be July 25, 26, 26 and 28, 1979.

At the Evidence Seminar in December, 1978 two publications were discussed concerning the investigation of financial transactions. Those publications are "Seventh Basic Investigative Technique: Analyzing Financial Transactions In The Investigation of Organized Crime And White Collar Crime Targets" by Richard A. Mossen and "Determination Of Undisclosed Financial Interest" by Richard A. Mossen. The first publication may be obtained by writing to the Law Enforcement Assistance Administration, 633 Indiana Avenue, Indiana Building, Washington D.C. 20530 and the second publication may be obtained by writing Clifford L. Karchmer, Batelee Law and Justice Study Center, 4000 N.E. 41st Street, Seattle, Washington, 90105, (206) 525-3130.

Enclosed in this issue is an advisory opinion from the Professional Conduct and Ethics Committee of the State Bar of Montana concerning conflicts of interest. The opinion was sought in an actual case and was brought before the Montana Supreme Court. The Court did not render an opinion, but refused to depart from the opinion issued by the Ethics Committee. As a result, the enclosed opinion appears to be not only the opinion of the Ethics Committee, but also the opinion of the Montana Supreme Court.

According to FBI Uniform Crime Reports, the majority of reported rapists are between 15 and 24 years of age. Separate studies show that over half the rape victims are under 21. Statistics further indicate that among teenagers particularly, rapist and victim often know one another, through relationships that range from close family friend to casual acquaintance. In an attempt to combat this type of "acquaintance" rape, the Department of Health, Education and Welfare's National Center for the Prevention and Control of Rape is making available this year a package of four educational films and accompanying discussion guide material. The materials are designed to provide young adults with strategies for preventing "acquaintance" rape. For information about receiving the package write to Association Films, Inc., 1111 North 19th Street, Suite 404, Arlington, Virginia, 22209.

Karen Townsend, Missoula Deputy County Attorney, has reviewed the book titled "The Abused and Neglected Child, Multi-Disciplinary Court Practice" and has found it to be of great assistance in child abuse and neglect cases. The cost of the book is $20.00 and is available from the Practicing Law Institute, 810 Seventh Avenue, New York, New York, 10019.

The Law Enforcement Services Divison of the Department of Justice will present a training seminar for newly elected county attorneys and newly appointed deputy county attorneys on March 1st and 2nd, 1979 at the Law Enforcement Academy in Bozeman, Montana. Attendance at the seminar will be limited to thirty-two participants because of space limitations. Cost for the attendees will be $6.50 per day for room and board at the Law Enforcement Academy. Attendees must also provide their own transportation. There will not be a registration fee charged, and attendees will not be required to pay for instructional materials supplied. Those interested in attending must notify Karen Fred, County Prosecutor Services Bureau, Attorney General's Office, State Capitol, Helena, Montana 59601 (449-3816) by February 20, 1979. Registration will be from 3:00 p.m. to 5:00 p.m. on February 28, 1979 at the Academy. The program of instruction is as follows:

MARCH 1, 1979 - THURSDAY

9:00 - 9:45 a.m.	Law Enforcement Services Division Introduction and Overview
10:00 - 11:00 a.m.	Interview and Interrogation
11:00 - 11:15 a.m.	Break
11:15 - 12:15	Crime Scene Preservation and Locating/Recognizing/ Identifying/Packaging/Transporting Evidence
12:15 - 1:30 p.m.	Lunch
1:30 - 2:30 p.m.	Sketches, Photographs and Chain of Evidence
2:30 - 2:45 p.m.	Break
2:45 - 3:45 p.m.	Scientific Evidence In Criminal Cases
3:45 - 4:00 p.m.	Break
4:00 - 5:00 p.m.	Scientific Evidence (Continued)
5:00	Adjourn
7:00 - 8:30 p.m.	Mock Homicide Scene and Critique

MARCH 2, 1979 - FRIDAY

8:30 - 9:30 a.m.	Prosecutorial Discretion, Plea Bargains and Guilty Pleas
9:30 - 9:45 a.m.	Break
9:45 - 10:45 a.m.	Courtroom Presentation of Evidence
10:45 - 11:00 a.m.	Break
11:00 - 12:30	Motions and Selected Trial Techniques
12:30	Adjourn

Numerous pieces of legislation have been introduced during the 46th Legislature which affect county attorneys. If any questions exist concerning legislation, please call Marc Racicot at 449-3816 or Tom Honzel at 442-4550.

RECENT CASES AND NOTES

ARREST - SEARCH & SEIZURE

A police officer solicted for an act of prostitution had the power to make an immediate warrantless arrest. Stepping outside the building and bringing in other officers to assist in making the arrest was proper and materials in plain view inside were lawfully seized. People v. Grow (App.) 148 Cal. Rptr. 648.

COMMENT ON SILENCE - NEW TRIAL

Four separate, intentional references to defendant's post-arrest silence in an effort to reduce the impact of the defendant's story that he thought the car he was driving contained possibly stolen clothing and not marijuana, entitled defendant to a new trial. United States v. Meneses-Davila (5th Cir.) 580 F.2d 888.

DRUGS & NARCOTICS

Proof that defendant possessed, at the same time, a controlled substance (marijuana) other than the one for possession of which he is being prosecuted (amphetamines) is a sufficiently similar act to warrant admission pursuant to statute to show absence of mistake and guilty knowledge. People v. McCarber (Mich.) 269 N.W.2d 186.

EQUAL PROTECTION

Equal protection was denied by two statutes which provided a higher sentence for shooting and wounding the victim than the sentence provided if defendant succeeded in killing the victim. People v. Montoya (Colo.) 582 P.2d 673.

EVIDENCE - DEPOSITIONS

In a prosecution for first degree murder and assault with intent to murder, the admission of a deposition of the assault victim videotaped while victim was hospitalized for treatment of injuries sustained during the assault was not unduly prejudicial because of its hospital setting. Any prejudice was outweighed by the substantive value of the testimony and by permitting the jury to observe the demeanor of the witness. People v. Glover (Mich.App.) 268 N.W.2d 362.

EXTRADITION

Once a governor's writ of extradition and warrant for arrest have been issued and served, questions relating to the regularity of the initial arrest are moot. Rentin v. Cronin (Colo.) 582 P.2d 677.

FIFTH AMENDMENT - WITNESS UNAVAILABLE

In attempting to use at trial the prior testimony of a grand jury witness on the basis the witness was unavailable, the defense attorney failed to carry the burden of showing that the witness was unavailable under Federal Rule 804(a)(1). The trial court correctly denied use of the prior testimony since although the witness was subpoenaed, the defense attorney made no attempt to call the witness to testify in the court's presence that she was invoking her Fifth Amendment privilege against self-incrimination, but elected instead to guess that the witness would invoke the Fifth if she were called. United States v. Pelton (8th Cir.) 578 F.2d 701.

HOMICIDE - CORPUS DELICTI

Blood on the pillow along with evidence that the victim's glasses and dentures were tangled in the bedsheets and the fact that victim's wallet and change purse were missing were sufficient circumstantial evidence to prove the corpus delicti of murder even though an autopsy did not reveal the manner or cause of death. Thus defendant's confessions indicating that he strangled the victim were properly admitted. Commonwealth v. Tallon (Pa.) 387 A.2d 77.

INSTRUCTIONS - WITNESSES

Both the defendant and his girlfriend testified that a third party would have been a valuable corroborating defense witness. Since the witness was peculiarly available to the defense and the defense made no showing of a bonafide attempt to locate the witness, the court was correct in giving a jury instruction that the testimony of the missing witness could be inferred to be unfavorable to the defense. Shelton v. United States (D.C.App.) 388 A.2d 859.

JURY INSTRUCTION - INSANITY

During a murder trial and over defendant's objections, the trial court instructed the jury about the possibility that defendant would be released from custody if the jury returned a verdict of not guilty by reason of insanity. This was reversible error since nothing was clarified, cured or corrected by the charge. State v. Huiett (S.C.) 246 S.E.2d 862.

JUVENILE - CONFESSION

Failure to inform a fifteen year old and his parents that the juvenile court lacked jurisidiction over murder charges did not render his confession involuntary. He was given Miranda and told he could be tried as an adult. His inaccurate impression that he could be tried as a juvenile did not render the decision to confess involuntary or unknowing. Jackson v. State (Ind.) 379 N.E.2d 975.

JUVENILES

A Defendant who was bound over to the juvenile authorities until he was nineteen was properly convicted of Second Degree Escape as an adult when he escaped from a juvenile correctional facility, after his eighteenth birthday. State v. Binford (Wash.) 582 P.2d 683.

Fact that juvenile court retained jurisdiction over the juvenile until he was nineteen, in order to rehabilitate him on other charges, did not require the court to hold a transfer hearing when he committed a burglary after he reached his eighteenth birthday. Henson v. State (Alaska) 576 P.2d 1352.

A ruling by the court that a defendant is not a juvenile is a final and appealable order because defendant's right to disposition of the charge in juvenile proceedings is forever lost if not resolved in his favor before jeopardy attaches. Choco v. United States (D.C.Cir.) 383 A.2d 333.

MARITAL PRIVILEGE - CONSPIRACY

The Ninth Circuit follows the federal rule, that a husband has a marital privilege to prevent his wife from testifying against him and to prevent use of her extrajudicial statements against him. However, the court held that where the wife is not the witness and the extrajudicial statements spoken by her were authorized by her husband in the joint furtherance of a criminal conspiracy, the extrajudicial statements of either spouse made in furtherance of the conspiracy may be admitted against the other. United States v. Price (9th Cir.) 577 F.2d 1356.

MIRANDA

After a simple assault, the defendant voluntarily sat in a patrol car with an officer whom he had known for years and, pursuant to the officer's request of him to "tell his side of the story", had a casual conversation with the officer. The defendant's statements were admissible notwithstanding an absence of Miranda warnings since, "the line between a general investigation and a custodial interrogation has not been crossed." Defendant was not arrested until several days later. State v. Tanguay (Me.) 388 A.2d 913.

RECEIVING STOLEN PROPERTY

Where defendant traded contraband for an item and there was a large disparity in value of the item and the contraband, an inference that he knew he was purchasing stolen property was permissible. Clark v. State (Ind.App.) 379 N.E.2d 987.

PRETRIAL PUBLICITY

Widespread adverse pretrial publicity about defendant by itself does not establish that defendant can't receive a fair trial. As long as each juror can honestly indicate that he will disregard everything that he heard outside and consider only the evidence presented in court, defendant is not entitled to a change of venue. Thomsen v. State (Okla.Cr.) 582 P.2d 829.

PROSECUTOR - DISQUALIFICATION

The prosecutor's office should not be disqualified from prosecuting a case just because one of the members of the office is going to be called as a defense witness at trial, unless the testimony will be prejudicial against the state. Therefore, requiring the disqualification of an entire prosecutor's office because four members might be called by the defense to testify at pretrial hearings was clearly an abuse of discretion, and is reversed. People v. Superior Ct. of San Luis Obispo Cty. (App.) 148 Cal.Rptr. 704.

SEARCH WARRANT

In view of evidence pointing to the entire third floor as defendant's residence, there was no need to suppress evidence obtained in the search of both apartments on the third floor used and occupied by him. United States v. Page (7th Cir.) 580 F.2d 916.

Failure to attach an inventory of items seized in the sheriff's return of the warrant did not prejudice defendant in preparation of his defense since the material was discoverable. Thus, there was no need to suppress the evidence. Mills v. State (Ind.App.) 379 N.E.2d 1023.

WITNESSES - IMPEACHMENT

Admitting prior inconsistent statements of two witnesses to impeach their credibility without giving them an opportunity to explain the inconsistencies was proper since both denied having made the prior statements. Commonwealth v. Little (Mass.) 379 N.E.2d 1105.

NOLO CONTENDERE

Colorado holds that nolo contendere plea is not a conviction for purposes of the recidivist statutes. People v. Goodwin (Colo.App.) 582 P.2d 1065.

SEARCH & SEIZURE

While the facts which constituted probable cause were not written within the four corners of the warrant issued, the facts were incorporated by reference on the affidavit to a tape recording of detailed oral statements of the sworn affiant before a magistrate. The court refused to read FRCP 41(C) narrowly and held that this procedure satisfies both purposes of the rule by providing the judge with the precise facts constituting probable cause and providing an accurate record upon which the reviewing court may determine the sufficiency of those facts. United States v. Mendel (7th Cir.) 578 F.2d 668.

Where the affidavit supporting a search warrant negligently misrepresented that the informer detected marijuana by sight rather than by smell, the warrant was nevertheless valid since, although material to the determination of probable cause, the allegation was neither deliberately false nor made in reckless disregard of the truth. United States v. Astroff, 578 F.2d 133 (5th Cir.)

Defendant throwing a phenmetrazine tablet out the window as an officer approached made it unnecessary to establish the reliability of the informant, etc. since the only "seizure" was the officer's retrieving the abandoned property. Suppressing the pill because the reliability of the informant was not established was reversible error. United States v. Speed (D.C.App.) 388 A.2d 892.

PUBLIC DEFENDERS DISTRUSTED

Many criminal defendants are skeptical of public defender offices because the legal services are free. Forty-nine percent of those interviewed said they felt most public defenders are "on the side of the state." Some expressed more trust in judges than they did in state-provided lawyers or in prosecuting attorneys. Researchers for the Stanford University study, financed by a grant from LEAA, found that 49 percent of public defender felony clients reported spending less than 30 minutes with their lawyers, and 27 percent said they had less than 10 minutes.

By contrast, nearly half of the defendants interviewed who had retained private practice lawyers said they spent more than three hours with their attorneys discussing their cases. The report emphasized, however, that increased time with a lawyer did not appear to be associated with more favorable case disposition. Nor was there any great difference between the case dispositions and sentences of defendant's with private lawyers and those with public defenders.

PUBLIC DEFENDERS DISTRUSTED, (Continued)

The report noted that time spent with a public defense lawyer does not reflect all the time spent on the case by the defender's office which uses paralegal personnel to conduct the initial interview, gather background information, and handle similar aspects of the case. Most private lawyers handle such matters themselves, the report said. Reprinted from LEAA Magazine, September, 1978.

RIGHT TO COUNSEL

A misdemeanor defendant's right to counsel depends upon the punishment he receives, not the punishment authorized by the statute he is accused of violating. As a result a defendant who pleaded guilty without the assistance of counsel and was fined $300 has his conviction upheld. Empy v. State, 24 Cr.L. 2073 (Texas Court of Criminal Appeals, 9/20/78).

PROSECUTION ARGUMENT: CHARACTERIZATION OF DEFENDANT - "VICIOUS, DESPERATE CRIMINAL" - INEFFECTIVE ASSISTANCE OF COUNSEL

Remarks by the prosecutor in closing argument characterizing defendant as a "vicious, desperate criminal who would kill for a nickle" were improper and prejudicial. Additionally, where the defendant's attorney failed to raise the issue of prosecutorial misconduct in his first trial motion and on direct appeal, this constituted ineffective assistance of counsel. (Commonwealth v. Smith, 385 A.2d 1320, Pa., 1978).

SEARCH: WHAT CONSTITUTES - EXTERIOR OF AUTOMOBILE

State merely viewing the exterior of an automobile parked in a public place is not a "search" because, in such a situation, there is no unconstitutional intrusion since there is no intrusion into an area in which there exists a reasonable expectation of privacy. In the instant case the police simply observed that which had been placed in plain view by the defendant's daughter when the defendant's own automobile was parked in a public parking lot, a location where the police had a right to be. Thus when the police examined the tires of the automobile with respect to their tread and groove patterns to determine their similarity to tires of an automobile presumably driven by the perpetrator of a homicide, no search within the purview of the Fourth Amendment took place. Commonwealth v. Mangini, 386 A.2d 482, Pa., 1978).

SEARCH INCIDENT TO ARREST: ROBBERY - WALLET

Where defendant was properly arrested for robbery, a search of his wallet was properly conducted as a search incident to arrest, and this included the unfolding and reading of a piece of paper found in the wallet, which contained a floor plan of the premises that had been robbed. "[Defendant] argues that, even if the search of the wallet were constitutionally permissible, the warrantless opening of the folded piece of paper found in the wallet was unreasonable, since once seized, it could neither present a danger to the officers nor be destroyed by the arrestee. We find that, in this case, the officers were not required to obtain a warrant to authorize them to open the folded piece of paper in as much as the opening of the paper was an integral part of the search for evidence..." Middleton v. State, 577 P.2d 1050, Alaska, 1978).

MIRANDA: WAIVER - IMPLIED

A valid waiver of Miranda rights may be implied under some circumstances where a defendant, who has been advised of his Miranda rights and has acknowledged his understanding of them, freely answers questions put to him by law enforcement officers. "We do not hold that the giving of a Miranda warning to the criminal defendant and acknowledgement of his rights by the defendant in all cases validates a subsequent confession elicited during custodial interrogation. Such a holding would clearly contravene the mandatory language of Miranda v. Arizona, supra. We do hold that the mere absence of an expressed waiver of Miranda rights by a defendant, who has been advised of those rights and has acknowledged his understanding of them, will not in all cases preclude the use of a subsequent confession obtained during custodial interrogation." State v. Baker, 580 P.2d 90, Kan.App., 1978.

EVIDENCE OF EXERCISE OF CONSTITUTIONAL RIGHTS: PROBATIVE VALUE

The fact that a jury is informed that the defendant exercised his constitutional right to counsel at the time of arrest or during interrogation is not error per se. In the instant case the fact that defendant did not want to talk to the police "until my attorney arrives" had significant probative value and such evidence was admissible in his trial. In support of an insanity defense the defendant has presented evidence that at the time he committed the offenses, he was in a dream or disassociative state with only a vague notion of the nature and quality of his acts. "Defendant's conduct and statements within a short time of his arrest were probative of the truth of his defense evidence. The officer testified, in rebuttal, that defendant appeared neither intoxicated, wild nor crazy, that there was nothing unusual about defendant's actions, that defendant was responsive to the advice of rights. It was in this context that the prosecutor brought out that defendant did not want to say anything until his attorney arrived. The argument to the jury was in the same context. The references to defendant's exercise of his right to counsel were in rebuttal to the insanity defense and were not error." State v. Day, 577 P.2d 878, N. Mex. App. 1978.

HEARSAY: EXCEPTIONS - PRESENT SENSE IMPRESSION

In a prosecution for possession of heroin, testimony concerning a statement, "flush the bags down the toilet - get rid of them," made by someone other than the witness, was hearsay since there was a clear inference from the statement that the bags referred to were likely to be the same ones defendant had allegedly taken, but the statement was properly admitted as a present sense impression exception to the hearsay rule. "Generally speaking, the rule is that hearsay is not admissible in evidence. But there are numerous exceptions to that rule. One that is pertinent here is what is termed as the 'Present Sense Impression,' i.e., 'A statement describing or claiming an event or condition, or immediately thereafter...The statement we are concerned with falls within that exception. The directive to dispose of the bags and tags was given by someone in the kitchen immediately after he or she had perceived the event, i.e., had heard the knock on the door. As stated by the Advisory Committee to the Federal Rules of Evidence, the underlying theory of this exception to the rule excluding hearsay 'is that substantial contemporaneity of events and statements negate the likelihood of deliberate or conscious misrepresentation.' This exception to the hearsay rule fits the situation we are dealing with in this case, and therefore, the statement was properly admitted into evidence." Richardson v. State, 579 P.2d 1372, Alaska, 1978.

"Now that I've won the case I plan to ask for perjury indictments against 17 witnesses and may bring charges of impersonating an attorney against my opponent."

DEFENDANT MAKES A BIG MISTAKE

Superior Court Judge James C. Roy's reputation for being a hard nosed jurist where repeat offenders are concerned indirectly cost a defendant three months in jail for contempt of court. The defendant, who already had spent six months in Charles Street Jail, knew his constitutional rights but made the mistake of being abusive while asserting them to Judge Paul A. Tamburello. He demanded a speedy trial in no uncertain terms.

"All right," Judge Tamburello replied. "I'll arrange a speedy trial." Turning to clerk A. Daniel Keohan, Jr., Judge Tamburello said: "Assign this case to Judge Roy's session for next Monday (which was six days away)." The defendant, his request granted, stared unhappily at the judge for a moment then blurted: "You _____."

Judge Tanburello ordered the defendant held in contempt of court and imposed a sentence of 90 days. He'll serve them at Charles Street Jail.

70 POLICE OFFICERS SLAIN

Seventy local, county and state law enforcement officers were killed feloniously in the United States and Puerto Rico during the first nine months of 1978. Seventy-one officers were slain during the same period in 1977. "The constant jeopardy in which law enforcement officers are placed, as evidenced by these crimes against them, cannot be overemphasized," FBI Director William H. Webster said. "Officers must be ever alert for potentially hazardous situations and take every precaution to guarantee their safety."

South Leads Nation. During the first nine months of 1978, there were 36 officers killed in the Southern States; 14 in the Western States; 10 in the North Central States; 7 in the Northeastern States; and 3 in Puerto Rico. Eleven officers were slain while enforcing traffic laws. Ten were killed while attempting to thwart robberies or in the pursuit of robbery suspects; 2 while attempting to apprehend burglary suspects; and 15 while attempting arrests for crimes other than robbery or burglary.

Ten Die In Ambush. Ten officers were slain in unprovoked or premiditated ambush-type attacks; 7 while handling disturbance calls; 7 while investigating suspicious persons; 6 while handling or transporting prisoners; and 2 while dealing with mentally deranged persons. Sixty-eight of the 70 officers were killed with firearms. Handguns were used in 53 of the slayings, and in 11 of these incidents, officers were killed with their own service weapons.

DRUGS - IDENTIFYING MARIJUANA

The Minnesota Supreme Court has upheld a trial court's finding that marijuana had not been satisfactorily identified by microscopic, Duquenois-Levine and T.L.C. testing or eight random samples of a seized substance, all of which has resulted in positive findings.

The accused had argued before the trial court that the state's chemist had lacked sufficient botanical training to make a positive identification by microscopic analysis; that the reagents used in Duquenois-Levine test were not tested to assure identity or purity; that there was no notation regarding the atmosphere saturation in the T.L.C. test tank and that neither a T.L.C. plate nor a vapor sample has been preserved. In addition, it was argued that the failure to purify the samples prior to testing left the possibility that combinations of naturally occurring substances had contaminated the samples and given inaccurate results.

The trial court had rejected the scientific test results but on the basis of non-scientific evidence had convicted the defendant of possession and selling marijuana. This non-scientific evidence included the fact that 220 pounds had been sold; that the sale price was $120 a pound and that defendant, upon his interrogation, had identified the product sold as "Mexican grade" marijuana.

The Minnesota high court held this non-scientific evidence insufficient to prove that marijuana had been possessed and sold. As the appeals court put it, "Minnesota law requires proof of the actual identity of the substance, the defendant's belief is not sufficient...". Further the court refused to reverse the trial court's decision rejecting the results of the three analyses. Since the trial court's finding had been based upon a factual matter, the court refused to reverse unless the decision below was clearly erroneous, which the court could not find that it was. State v. Vail, Minn. Sup.Ct., 10/20/78.

DRUGS - PROVIDING THE EXISTENCE OF A CLANDESTINE DRUG LABORATORY

It is not necessary, says the Wisconsin Supreme Court, to prove that methamphetamine (speed) has been actually produced in a clandestine drug laboratory in order to charge those involved in the operation of the laboratory with manufacturing that controlled substance. The D.E.A. forensic chemist who testified for the prosecution had indicated that "the substance found in the house was one step away from the actual production of crude methamphetamine." No methamphetamine had been found on the premises but "all of the substances and equipment necessary for one method of producing methamphetamine" were there. And phenyl-2-propanone, a precursor of methamphetamine, was also located on the premises.

DRUGS - (Cont.)

The court did not decide at what exact point manufacturing as stated by the statute, would be established. As the defendant put it, would the purchase of "hydrochloric acid, 55 gallon drum(s), refrigerators, leasing a building "suffice?" The court evaded a direct answer to this query by asserting that the statute was not constitutionally vague for failing to specify what precise acts constitute the crime of manufacturing. State ex rel. Bell v. Cty. Court for Columbia, 263 N.W.2d 162 (Wis. 1978).

NO NEED TO TEST STANDARD USED IN L.S.D. T.L.C. TESTING

In a case involving the unlawful delivery of LSD, the court held that it is not necessary to test and directly prove the identity of the government standards used in running the laboratory tests. In appealing his conviction for unlawful delivery of a controlled substance, defendant asserted that the substance in question was not proved to be LSD beyond a reasonable doubt since the positive thin layer chromatography tests run on the substance relied on a comparison standard which had not been tested itself.

The chemist had obtained the LSD standard from his supervisor who in turn received the drug from the federal government. The court ruled that these circumstances "lend a certain prima facie reliability" that the standard was what it was represented to be. In addition, the court held that the mechanics of the thin layer chromatography test was compelling circumstantial evidence that the substance sold was LSD, without regard to any direct proof of the identity of the standard as LSD. People v. Brannon, 375 N.E.2d 840 (Ill.App. 1978).

EVIDENTIARY MATTERS: HYPOTHETICAL QUESTIONS OF EXPERTS

A hypothetical question may be asked of an expert even though it is "based on assumed rather than established facts," says the D.C. Court of Appeals in affirmating the conviction of a father for acts causing injuries to his seven month old son.

The seven month old child had been found by his mother with severe skull injuries after the child had been left alone with his father. The father testified that the injuries were sustained when he accidentally dropped the baby to the floor as he lifted him from his crib. The prosecution's experts were asked if the child's injuries were "consistent with the child's being swung, thrown or thrust onto a large, flat surface." The experts answered that they were.

The defense objected to this opinion testimony as based on a wholly speculative facutal basis as to what had happened during the father's custody of the child and because "there was no evidence to support such a hypothesis." The appellate court found that the hypothetical was "reasonably consistent with the evidence" and noted the qualifications of the experts and their familiarity with the evidence in the case. It is within the ken of an expert's testimony to "draw inferences from the facts which a jury would not be competent to draw." Cohoon v. U.S., 387 A.2d 1098 (D.C.APP. 1978)

FINGERPRINTS - SUFFICIENT ALONE TO CONVICT

The Arizona Supreme Court has upheld a burglary conviction where the only evidence connecting the defendant with the crime was a fingerprint found on the inside glass of the kitchen window through which the burglar gained access to the house. At trial, a police identification technician testified that the print found on the glass matched the defendant's left middle finger. The court, in upholding the conviction, said that "a crime may be proven by circumstantial evidence alone, and that fingerprints are a measure of positive identification by which a defendant may be linked with the commission of the offense." State v. Carter, 578 P.2d 991 (Ariz. 1978).

FINGERPRINT EXPERT: TESTIMONY NOT BEYOND EXPERT'S ABILITY AND TRAINING

A fingerprint expert has been permitted, by the Supreme Court of Hawaii, to testify not only that the defendant's finger and palm prints were found at the crime scene but also as to the positions of the accused's hands when the prints were made; to the question of whether the prints were impressed simultaneously by one hand; to the degree of pressure applied when the prints were impressed; to the conduct and position of the defendant when he placed the prints. None of these opinions were deemed beyond the expert's special knowledge and ability, even though the Hawaii high court had some reservations about the expert's ability to testify to all of these conclusions.

The fingerprint testimony had been introduced in a rape/murder prosecution where the entire case against the defendant was circumstantial. The victim's partially clothed body had been found in a restroom adjoining a launderette in a Hawaii motel in which the deceased was a registered guest. Fourteen latent prints identified as belonging to the defendant were found on the top edge of the bathtub and on the toilet seat cover in the restroom where the deceased was discovered. The defendant sought to explain the presence of his prints by admitting that he had visited the restroom some time prior to the homicide in order to urinate. The position of the prints was attributable to the defendant's having lost his balance while removing one of his sandals in the restroom. In regaining his balance, he may have placed his finger and palm prints on the tub and toilet seat, so the accused argued. The testimony of the prosecution's expert left the impression, in the view of the defendant, that defendant had placed his fingerprints in the locations from which they were lifted while in an almost prone position while raping the deceased.

The Hawaii Supreme Court was troubled by the ability of the experts to testify that the fingerprints indicated that they were applied by a pressure that was caused by the accused's being "fairly low in relation to the floor at that time" and that he was "apparently trying to pull himself forward at the time the prints were impressed."

FINGERPRINT EXPERT (Cont.)

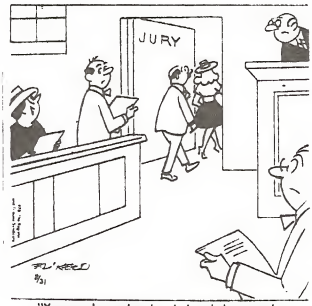
However, the court found that this testimony was not prejudicial to the accused because it coincided with his asserted view of the manner in which the prints had been placed there. Further, the court approved the expert's use of demonstrative evidence which revealed the exact height and location of the toilet seat and the top edge of the bath tub. The court found that this display was neither misleading nor inaccurate. State v. Murphy, 575 P.2d 448 (Haw. 1978).

ELECTRONIC SURVEILLANCE - "BEEPER"

Finding itself in agreement with the reasoning of the Ninth Circuit, see U.S. v. Hufford, 539 F.2d 32, 19 CrL 446 (1976), the New York Supreme Court, Bronx County concludes that the use of an electronic "beeper" tracking device "is clearly distinguishable from wire-tapping or illegal eavesdropping***. The 'beeper' is merely an aid in a surveillance operation." Thus the attachment of a beeper to a suspect's car in most cases involves no Fourth Amendment violation. People v. Colon, NY Sup. Ct., Bronx Cty, published 10/24/78, 24 CrL 2209.

PROBABLE CAUSE TO SEARCH TRUNK NOT ESTABLISHED FROM PLAIN VIEW SEIZURE OF DRUGS IN PASSENGER COMPARTMENT

A police officer's plain view observation of a plastic container of marijuana in the passenger compartment of a motor vehicle which he had stopped for a documents check may have justified the arrest of the occupants and a search of the passenger compartment, but such observation did not permit the officer to conduct a warrantless search of the vehicle's locked truck. State v. Patino, 24 Cr. L. 2179 (11-29-78).



"You people go ahead — I already have made up my mind."

INSANITY ACQUITTEES INSTITUTIONALIZATION IS LIMITED

In In re Moye, 24 Cr. L. 2159 (11-22-78), the California Supreme Court concluded that an insanity acquittee could not be institutionalized beyond the maximum term for the underlying criminal offense unless the state first established grounds for an extended confinement.

RAPE SHIELD LAW IS CONSTITUTIONAL

A Colorado statute which shields a sexual assault victim from examination of her past or subsequent sexual activities did not unconstitutionally infringe upon the judiciary's province, the Colorado Supreme Court held in People v. McKenna, 24 Cr. L. 2170 (11-22-78).

40 YEAR SENTENCE FOR MARIJUANA OFFENSES NOT SEVERE

In holding that two consecutive 20 year prison terms imposed upon a marijuana defendant were not cruel and unusual punishment, the Fourth Circuit applied a "shock the conscience test" rather than the four-pronged analysis of Hart v. Coiner, 483 F.2d 136 (4th Cir. 1973) in reaching its decision. Davis v. Davis, 24 Cr. L. 2157 (11-22-78).

ROUTINE DETENTION OF TRAFFIC OFFENDERS FOR WARRANT CHECKS FOUND TO BE UNREASONABLE

The California Supreme Court, in a split decision, has held that police officers may not routinely detain traffic offenders for the purpose of running a warrants check noting that such detentions are significant intrusions. People v. McGaughran, 24 Cr. L. 2177 (11-29-78).

U.S. SUPREME COURT - COURT CLARIFIES TEST FOR STANDING TO CHALLENGE SEARCH

In a 5-4 decision, the United States Supreme Court has reaffirmed the principle that Fourth Amendment rights are personal and should not be applied vicariously. Additionally, the court said the better test to be applied in cases where standing is at issue is an analysis where the focus should be directed on a particular defendant's rights rather than on a theoretically separate, but invariably intertwined concept of standing. Rakas v. Illinois, 24 Cr. L. 3009 (12-6-78).

A police officer on routine patrol received a radio report notifying him of an armed robbery and a description of the getaway car. Shortly thereafter, the officer spotted a vehicle matching the description of the radio report. Upon stopping the vehicle, the officer discovered two men and two women occupants; ordered all occupants out of the vehicle and conducted a search of the passenger compartment and glove compartment. As a result of the search, a box of shotgun shells were confiscated from the glove

compartment and a sawed-off shotgun was discovered under the vehicle's front seat. Both males were arrested for robbery. Prior to trial, the defendants moved to suppress the shotgun shells and the shotgun. The prosecution objected contending the defendants lacked standing to question the validity of the search since neither owned the vehicle, or had any rights therein and were merely passengers, and neither had claimed ownership of the shotgun and shells. The trial court agreed and denied the motion. The defendants were subsequently convicted. On appeal to the Illinois Court of Appeals, the trial court decision was affirmed with the court holding that without a proprietary interest in an automobile, a mere passenger lacks standing to challenge the legality of the search of the vehicle.

On appeal to the high court, the defendants contend that the rule of standing annunciated under Jones v. United States, 362 U.S. 257 (1960), should be either relaxed or broadened so that any criminal defendant at whom a search was directed would have standing to object to the legality of the search and thereby be free to move for suppression of the evidence seized. In rejecting the use of the so-called "target" test announced by Jones the court said to reject petitioners' contention reaffirms the principle that Fourth Amendment rights are personal and should not be asserted vicariously. In further emphasizing its point, the court said that under petitioner's target theory, a court could determine that a defendant had standing to invoke the exclusionary rule without having to inquire into the substantive question of whether the challenged search or seizure violated the Fourth Amendment rights of that particular defendant.

In noting the personal realationship between the individual and the Fourth Amendment, the court was led to question whether the concept of standing should still be considered an issue separate and apart from the merits of a Fourth Amendment claim. In finding that the preferred analysis should focus on the extent of a particular defendant's rights under the Fourth Amendment rather than on a theoretically separate, but inter-twined concept of standing, the court said that its decision does not cast the least bit of doubt on cases which recognize that as a general proposition the issue of standing involves two inquiries. The first requires a demonstration of injury-in-fact while the second requires a showing that the individual is asserting his or her rights as opposed to those of a third party.

The petitioners had contended in the alternative that they did have standing to question the validity of the search and seizure because they were "legitimately on the premises" under the test of Jones, supra. Not being persuaded by this argument, the court said the "legitimately on the premises" test painted the Fourth Amendment in strokes which were too broad. Furthermore, the court said Jones, supra, should be read in light of an expectation of privacy rather than framing it in terms of being in the right place at the wrong time. In the present case, and unlike Jones, the petitioners neither had a proprietary interest

in the vehicle, the glove compartment, or the contraband which was discovered. Therefore, applying an expectation of privacy test, petitioners had nothing which would have contributed to the establishment of facts which would have afforded them standing to challenge the search.

In a dissent filed by Justices White, Brennan, Marshall and Stevens, the jurists characterized the majority's adoption of privacy test as declaring open season on automobile searches. By rejecting the "legitimately on the premises" rationale, the majority has now equated privacy interest with property interest for purposes of the Fourth Amendment. Answering this argument the Chief Justice and Justice Powell said the new standard is not focused upon property interest, rather it is focused upon whether a legitimate expectation of privacy exists.

PROPOSED OPINION

OF

PROFESSIONAL CONDUCT AND ETHICS COMMITTEE

You have requested our opinion as to whether there is any ethical impropriety arising from the following situation: Attorney J and Attorney F form a partnership. Attorney F is elected county attorney of a county other than the residence of Attorney J. Prior to his election, F and J were associated in the defense of a deliberate homicide case in the county which elected F as county attorney, which case has not yet gone to trial. The defendant in such case has been incarcerated for 10 months. The case is a complicated one, requiring lengthy preparation.

Your specific inquiries are as follows:

1. May Attorney J continue to do criminal defense work outside the county in which Attorney F is county attorney?

2. If a special prosecutor is appointed to handle the above-referenced deliberate homicide case, may Attorney F continue to assist in the defense thereof?

3. If Attorney F is precluded from assisting in the defense of the said deliberate homicide, may Attorney J assist in such defense?

Our discussion of this matter is based upon Canon 5 which provides, "A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client." DR 5-105 (D) thereunder provides, "If a lawyer is required to decline employment or to withdraw from employment under DR 5-105, no partner or associate of him or his firm may accept or continue such employment."

In analyzing inquiry no. 1, ABA Formal Opinions 49 and 16 are helpful. Formal Opinion 49 provided:

> "The relations of partners in a law firm are such that neither the firm nor any member or associate thereof, may properly accept any professional employment which any member of the firm cannot properly accept."

Formal Opinion 16 provided:

> "So long as the partnership relation continues between the county prosecutor and his professional associate, it is clearly unethical for one member of the firm to oppose the interests of the state while the other represents those interests."

The duty of a prosecutor to the State is so complete that he must decline to accept the defense of criminal cases in another state because of its potential interference with the cooperation known to exist among police authorities and prosecutors across state lines (ABA Formal Opinion 30). Certainly, such cooperation is, if anything, more significant among the counties of a state. In view of the foregoing, it is clear that Attorney F could not properly defend criminal cases outside the county in which he serves. It therefore follows that it would be equally unethical for attorney J to do so.

It should be noted in passing, that proposed DR 2-111(D) would appear to specifically preclude such representation by a county attorney or his deputies.

As to inquiry no. 2, it would appear that Attorney F is also precluded from representing the defendant in the pending deliberate homicide. As county attorney, F will have access to the files in that office; he will have daily contact with the law enforcement officers involved in the investigation; and he will be receiving a paycheck from the county and the state. The possibilities of a

breach of confidentiality (in violation of Canon 4), of impairment of professional judgment (in violation of DR 5-105), and of attempts to influence by law enforcement officers or his employer, the county, is overwhelming (in violation of DR 5-107). In any event, the appearance of impropriety would clearly exist (in violation of DR 9-101).

As to inquiry no. 3, if Attorney F is precluded from assisting in the defense of the criminal homicide, Attorney J is also precluded on the basis of DR 5-105(D).

This opinion is advisory only.

STATE BAR OF MONTANA
PROFESSIONAL CONDUCT AND ETHICS COMMITTEE